

ORDER NO. 2646

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Robert G. Taub, Acting Chairman;
Tony Hammond, Vice Chairman;
Mark Acton;
Ruth Y. Goldway; and
Nanci E. Langley

Periodic Reporting
(Proposal Thirteen)

Docket No. RM2015-7

ORDER GRANTING MOTIONS TO STRIKE

(Issued August 10, 2015)

I. INTRODUCTION

At issue are separate motions filed by the Postal Service and Amazon Fulfillment Services, Inc. (Amazon) to strike the Third Neels Model submitted in conjunction with a July 22, 2015 United Parcel Service (UPS) filing.¹ UPS opposes the Motions to

¹ See Motion of the United States Postal Service to Strike Third Set of Models Submitted by United Parcel Service, July 27, 2015 (Postal Service Motion to Strike); and Motion of Amazon Fulfillment Services, Inc., to Strike Portions of Reply Comments Filed by United Parcel Service, Inc. on July 22 and 23, 2015, July 29, 2015 (Amazon Motion to Strike). When referred to collectively in the text of this Order, these documents are identified as the "Motions to Strike." See also United Parcel Service, Inc.'s Reply to Comments of the United States Postal Service and Amazon Fulfillment Services, Inc. Related to Proposal Thirteen, July 22, 2015; and Second Supplemental Report of Kevin Neels on behalf of United Parcel Service, July 23, 2015 (Third Neels Model).

Strike.² For the reasons stated below, the Commission grants the Motions to Strike.

II. BACKGROUND

A. Proposed Change in Analytical Principles

Scope of Petition. On December 11, 2014, the Postal Service filed a petition to initiate a rulemaking to consider revisions to the city carrier street time model pursuant to Commission rule 3050.11.³ The Petition included an attachment summarizing the proposed revisions, referred to as Proposal Thirteen. An accompanying report (filed as a library reference) described Proposal Thirteen in greater detail. *Id.* at 1.

According to the Postal Service, the proposed revisions concern comprehensive updates to the variabilities and cost pools used for city carrier street time. *Id.* To support the proposed revisions, the Postal Service (among other things) conducted a special field study to obtain pertinent data from a sample of 300 ZIP Codes drawn from a database that covers more than 140,000 carrier routes (the Form 3999 database). *Id.* at 5. The Postal Service masked the identity of the 300 ZIP Codes by assigning them different ZIP Codes.

Implementation target. The Postal Service noted that Proposal Thirteen represents a much more substantial undertaking than often encountered in rule 3050.11 proceedings, but stated it was submitting the Petition to get the process started, with the objective of having the rulemaking completed in sufficient time for the outcome to form the basis for reporting city carrier street time costs in the Fiscal Year (FY) 2015 Annual Compliance Report (ACR). *Id.* at 1-2.

² See United Parcel Service, Inc.'s Reply to Motion of the United States Postal Service to Strike Third Set of Models Submitted by United Parcel Service, July 29, 2015 (UPS Reply to Postal Service Motion to Strike) and United Parcel Service, Inc.'s Response to Motion of Amazon Fulfillment Services, Inc. to Strike Portions of UPS's Reply Comments, August 3, 2015 (UPS Reply to Amazon Motion to Strike).

³ Petition of the United States Postal Service for the Initiation of a Proceeding to Consider Proposed Change in Analytical Principles (Proposal Thirteen), December 11, 2014 (Petition).

Nature of proceeding. Rule 3050.11 provides a forum for advance review of changes in accepted analytical principles used in annual Postal Service reports to the Commission. The ACR, which the Postal Service files pursuant to 39 U.S.C. § 3652, is an annual report under the Commission's rules. See 39 C.F.R. §§ 3050.1(e) and (g). As outputs of the city carrier model are used in the ACR, the Postal Service appropriately filed the Petition under rule 3050.11.

Context. Rule 3050.11 was adopted following enactment of the Postal Accountability and Enhancement Act (PAEA).⁴ It is based on the informal (notice-and-comment) provisions of the Administrative Procedure Act (APA).⁵ In the order proposing rule 3050.11, the Commission explained it expected that in the new PAEA environment, the Postal Service would continue to take the lead in deciding how data about finances, operations, and performance would be collected and analyzed.⁶ However, the Commission also explained that the PAEA allowed analytical issues to be addressed in the context of informal rulemakings, allowing the Commission to provide an opportunity for input and feedback from other stakeholders. Order No. 104 at 30-31. The Commission stated it intended to take advantage of this opportunity by approaching analytical issues through a process that promotes cooperation and facilitates consensus, and proposed procedures that were highly flexible and that would vary according to the complexity of the proposed change and the level of supporting documentation. *Id.* at 31. The proposed procedures did not impose a particular lead time on petitioning for or completing a proceeding to change an accepted analytical principle, but the Commission stated that as a practical matter, if complex or controversial changes were proposed, a proceeding would need to be started well in advance of the due date of the ACR in which the changes were expected to be used. *Id.* at 35.

⁴ See Docket No. RM2008-4, Notice of Final Rule Prescribing Form and Content of Periodic Reports, April 16, 2009 (Order No. 203).

⁵ *Id.* at 10; see also 5 U.S.C. § 553.

⁶ See Docket No. RM2008-4, Notice of Proposed Rulemaking Prescribing Form and Content of Periodic Reports, August 22, 2008, at 30 (Order No. 104).

B. Key Procedural Developments

1. Requests for Extensions of Comment Deadlines

Shortly after the Petition was filed on December 11, 2014, the Commission established the instant proceeding, noting that the Postal Service anticipated implementing the proposed methodology change in time for the FY 2015 ACR.⁷ The Commission set March 11, 2015, and April 8, 2015, respectively, as the deadlines for comments and reply comments. *Id.* The Commission later extended the deadlines to March 18, 2015, and April 15, 2015, respectively, in response to separate Public Representative and Postal Service requests.⁸ The Commission, acting on the assumption that the Postal Service's model was the only one under consideration, observed that the additional time would not unduly delay the proceeding, nor would it give rise to unreasonable prejudice or other harm. *Id.* at 2.

2. Request for Expanded Access to Postal Service Data

Prior to extending the comment deadlines, the Commission granted an unopposed UPS request for access to a non-public Postal Service library reference.⁹ UPS based its request on the contention that the library reference contains data that relates to how the Postal Service proposes to calculate the cost impacts of competitive products within cost segment 7 and provides a crosswalk between the masked ZIP Codes provided in the public files and the actual ZIP Codes used in the study ("crosswalk file"). First UPS Access Motion at 2.

⁷ See Order No. 2294, Notice and Order on Petition for Rulemaking (Proposal Thirteen), December 18, 2014, at 3.

⁸ Order No. 2389, Order Extending Comment Deadlines, March 11, 2015. In Order No. 2433, the Commission suspended the April 15, 2015 deadline for filing reply comments addressing initial comments on the Postal Service's proposal pending resolution of the Second UPS Motion for Access. See Order Directing United Parcel Service, Inc. to File Supplemental Information and Suspending Reply Comment Deadline, April 9, 2015, at 2 (Order No. 2433).

⁹ See United Parcel Service, Inc.'s Motion Requesting Access to Non-Public Materials Relevant to Proposal Thirteen Under Protective Conditions, February 18, 2015 (First UPS Access Motion) and Order No. 2363, Order Granting Motion for Access to Non-Public Material, February 24, 2015.

3. Models Filed by UPS

Initial Neels Model. UPS was among those filing comments on March 18, 2015.¹⁰ However, UPS's filing differed from the submissions of other commenters in two significant ways. First, it not only offered comments on the Postal Service's proposed revisions, but also included an alternative model developed by a consulting team led by Dr. Kevin Neels (Initial Neels Model). *Id.* at 5; *see also id.* Exhibit A. Second, it was accompanied by another request for access to non-public information related to the Form 3999 database.¹¹ Specifically, UPS sought production of the full set of non-public Form 3999 data and the associated crosswalk file linking the masked ZIP Codes in the data to the actual ZIP Codes. Second UPS Access Motion at 2.

UPS explained that in the Initial Neels Model, Dr. Neels had restricted his analysis to the 300 ZIP Codes used in the Proposal Thirteen studies because he could not map the masked ZIP Codes for the non-study ZIP Codes to actual ZIP Codes. *Id.* at 2-3. UPS contended that the Initial Neels Model would benefit from utilizing a broader dataset, which would be possible if UPS was granted access to the requested crosswalk file and full set of non-public Form 3999 data. *Id.* at 2.

UPS asserted that access to the broader set of ZIP Codes would allow UPS to “stress test” its model and examine model performance on the entire system of Postal Service routes. *Id.* at 3. It also said access to the data would allow Dr. Neels to further develop the appropriate methodology for distributing attributable costs to individual products under his model. UPS estimated that it could complete its analysis of the broader dataset and prepare a supplemental report as early as June 5, 2015.¹²

¹⁰ United Parcel Service Comments on Postal Service Proposal Thirteen Regarding City Carrier Street Time Costs, March 18, 2015 (UPS Comments). Exhibit A of the UPS Comments consists of the Report of Kevin Neels on Behalf of United Parcel Service (Initial Neels Model).

¹¹ Motion of United Parcel Service, Inc. for Issuance of Information Request Relevant to Proposal Thirteen, March 18, 2015 (Second UPS Access Motion).

¹² United Parcel Service's Supplemental Information in Response to Order No. 2433, April 14, 2015, at 3.

The Postal Service opposed UPS's access request on several grounds, including the fact that there was no provision in the original procedural schedule for evaluation of an alternative model and that the access request could cause undue delay.¹³

In Order No. 2455, the Commission granted the Second UPS Access Motion. It noted that the original schedule did not contemplate review of alternative models, but found that adjustments to the schedule could be made if warranted.¹⁴ The Commission found that the request for expanded access could unduly delay the proceeding; however, the Commission also observed that UPS suggested that consideration of its model could be completed within a period that allowed for issuance of a Commission decision in time for incorporation into the FY 2015 ACR. *Id.* at 10. The Commission stated that barring unforeseen developments, UPS's request appeared reasonable, but cautioned: "[s]hould events prove otherwise, the Commission can take action to ensure that the objective of issuing a decision in time for preparation of the FY 2015 ACR is met." *Id.* Based on this assessment, the Commission extended the deadline for reply comments addressing previously-filed initial comments to May 13, 2015, and directed UPS to file a supplemental report with the results of its additional analyses by June 8, 2015. *Id.* at 12. The Commission set July 8, 2015, and July 15, 2015, respectively, as the deadlines for filing initial and reply comments addressing the UPS Supplemental Report. *Id.*

Second Neels Model. On June 8, 2015, UPS filed comments, along with the UPS Supplemental Report detailing the results of additional analyses performed following review of the broader non-public Form 3999 database (Second Neels Model).¹⁵ UPS characterized its filing as follows:

¹³ Answer of the United States Postal Service in Opposition to UPS Motion Requesting Issuance of an Information Request, March 30, 2015, at 3-5.

¹⁴ Order Granting United Parcel Service, Inc. Motion for Issuance of Commission Information Request No. 1 and Revising Procedural Schedule, April 23, 2015, at 9 (Order No. 2455).

¹⁵ United Parcel Service Comments Attaching Supplemental Report Related to Proposal Thirteen, June 8, 2015 (UPS June 8 Comments). The referenced report appears as Exhibit A attached to the UPS June 8 Comments, collectively referred to as, "UPS Supplemental Report."

Dr. Neels has developed a *new approach* for the Commission to consider. With the benefit of being able to use the more robust dataset from the Form 3999 database, *Dr. Neels' recommended approach has evolved* from his preliminary work in connection with his initial report, where he was severely constrained by the limited data available to him at that time. Based on his analysis of which model best fits the additional data, Dr. Neels now utilizes the flexible functional form model used by the Postal Service in Proposal Thirteen, but with some *important modifications*.

Id. at 4 (emphasis added).

Consistent with the revised procedural schedule, the Public Representative, the Postal Service and Amazon filed comments on July 8, 2015.¹⁶ The Postal Service noted that the UPS June 8 Comments included responses to points made by the Postal Service in the Postal Service's May 13, 2015 filing. Postal Service July 8 Reply Comments at 1. The Postal Service stated: "It bears noting that no such surreply comments were authorized by Order No. 2455." *Id.* The Postal Service nevertheless submitted its response to the UPS Supplemental Report, along with a reply by its expert (Dr. Bradley) addressing the Second Neels Model. Amazon also filed comments, along with the supporting declaration of Dr. Christian T. Lundblad, explaining why the Commission should not accept either of the Neels Models.

Third Neels Model. On July 22, 2015, pursuant to an extension the Commission granted at UPS's request, UPS filed the reply comments authorized by Order No. 2455. The reply comments were accompanied by another report addressing the Third Neels Model.¹⁷ UPS characterized Dr. Neels' changes as a refinement to the Second Neels Model, explaining:

¹⁶ See Public Representative Initial Comments on United Parcel Service's Supplemental Report, July 8, 2015; Reply Comments of the United States Postal Service in Response to UPS Supplemental Report, July 8, 2015 (Postal Service July 8 Reply Comments); and Comments of Amazon Fulfillment Services, Inc., July 8, 2015 (Amazon July 8 Comments).

¹⁷ See Order No. 2571, Order Granting Motion of United Parcel Service, Inc. for Access to Certain Non-Public Material and Extending Reply Comment Deadline, July 8, 2015. See also United Parcel Service, Inc.'s Reply to Comments of the United States Postal Service and Amazon Fulfillment Services, Inc. Related to Proposal Thirteen, July 22, 2015 (UPS July 22 Reply Comments).

Dr. Neels has considered the comments of the Public Representative, the Postal Service, and Amazon, and he has continued to refine the model's imputation approach. As a result, Dr. Neels has made three refinements to his model, while attempting to stay as close as possible to both the general spirit and the specific features and details of the analysis presented in the June Report [addressing the Second Neels Model].

UPS July 22 Reply Comments at 5.

III. MOTIONS TO STRIKE AND RESPONSES

A. Postal Service Motion to Strike

The Postal Service contends that the Third Neels Model was improperly submitted under the guise of reply comments. Postal Service Motion to Strike at 6. It asserts that allowing the Third Neels Model to be considered in this proceeding would constitute "a gross violation of the due process rights of the Postal Service and other interested parties." *Id.* at 1. The Postal Service adds: "...the record on June 8th certainly appeared like it contained all of the models...the Commission would need to evaluate the UPS arguments." *Id.* at 3.

More specifically, the Postal Service contends that reply comments do not afford an opportunity to perform "wholesale revisions" to the substance of what opposing parties have been allowed to evaluate and criticize. *Id.* at 4. It states that it does not oppose allowing UPS to submit quantitative analysis with its reply comments, but contends that any such analysis "would properly have been limited to defending the results of the model previously provided, not coming up with entirely new results from new models, upon which the Commission is then encouraged to rely." *Id.* In addition, the Postal Service asserts that the new models "are not just slight modifications," but "involve complicated new methods that contained unverified assumptions and potentially controversial methods." *Id.* at 4, 5 (emphasis omitted). As a remedy, the

Postal Service asks the Commission to strike the Third Neels Model and limit consideration to the Second Neels Model timely submitted on June 8, 2015. *Id.* at 5.

In support of its position, the Postal Service claims that its preliminary review of the Third Neels Model revealed that the model had been substantially changed from the prior iterations. *Id.* n.3. Examples of changes include construction of intertemporal volume change indexes, allegedly without explanation or provision of necessary definitions; abandonment of negative binomial imputation equations; and combination of in-receptacle parcels and deviation parcels into a single equation to estimate the Form 3999 street time variability equation. *Id.*

B. Amazon Motion to Strike

Amazon moves to strike the Third Neels Model on grounds of due process, including APA rulemaking notice requirements, and Commission precedent. Amazon Motion to Strike at 2.

Like the Postal Service, Amazon contends that Order No. 2455 did not authorize the filing of the Third Neels Model, because, as modified by Order No. 2571, Order No. 2455 limited the Amazon July 8 Comments, the Postal Service July 8 Reply Comments, and the UPS July 22 Reply Comments to UPS Supplemental Report, addressing the Second Neels Model. *Id.* at 2-3. Amazon claims the Third Neels Model and associated UPS Supplemental Report are not a "comment" in defense of the Second Neels Model, but rather a new and substantially different model. *Id.* at 3.

Amazon also claims that by Dr. Neels' admission, the Third Neels Model differs from the Second Neels Model submitted in several major respects. *Id.* at 3. It asserts that the Third Neels Model substitutes "simple linear regression [imputation] models" for the "negative binomial [imputation] models" used in the Second Neels Model. *Id.* Amazon states the new imputation model adds new explanatory variables that were not included in either of Dr. Neels' previous imputation models. *Id.* Amazon also notes that in contrast to Dr. Neels' previous second-stage regression models, which developed variabilities separately for deviation parcels and in-receptacle parcels, the second-stage

regression in the Third Neels Model includes only a combined parcel variable identified as “parcels.” *Id.* Amazon observes that a review of Dr. Neels’ workpapers may reveal other significant differences between the Second and Third Neels Models, but represents it cannot evaluate this until its experts have an opportunity to complete review of the supporting library reference. *Id.* n.2.

Amazon also asserts that the results of the Third Neels Model “differ greatly” from the results of Second Neels Model. *Id.* at 3. It states that the city carrier cost variability percentage for parcels estimated in the Third Neels Model differs by a factor of two from corresponding figures in the Second Neels Model. *Id.* at 3-4.

Moreover, Amazon claims that longstanding Commission precedent makes clear that a new cost study is an improper reply to a criticism of a study previously offered by the same party in the same case. *Id.* at 4. Amazon cites an over 30-year-old case where the Commission granted a motion by UPS to strike cost studies submitted by the Postal Service for the first time in its rebuttal testimony and found that the “additional studies...could and should have been included in its direct case.” *Id.* at 4.

Amazon asserts that the gravity of the due process violation is heightened by the subject of this proceeding, because the attribution of city carrier street time costs is one of the most important, complex, controversial and fact-intensive tasks that the Commission faces. *Id.* at 6. It contends that as the Commission has repeatedly held, studies and data on city carrier costs may not lawfully be credited without an opportunity for rebuttal by affected parties. *Id.*

Amazon concludes that the Commission should strike the Third Neels Model to enforce the scope of its prior orders and ensure that all parties have sufficient opportunity to review and comment on the models being considered by the Commission. *Id.* at 6-7.

C. UPS Reply to Postal Service Motion to Strike

UPS characterizes the Postal Service as objecting to the fact that Dr. Neels has made “some modifications to one portion of the model” he developed in response to

specific criticisms advanced by the Postal Service and Amazon. UPS Reply to Postal Service Motion to Strike at 1. UPS claims it was "forthcoming and clear" in describing the changes in the Third Neels Model and why they were made. *Id.* UPS claims the Postal Service provides no reason to doubt that Dr. Neels' changes accomplish the objective of improving the reliability of the imputations Dr. Neels made to overcome deficiencies in Postal Service data. *Id.* at 1-2.

In addition, UPS asserts that nothing about the core of the Second Neels Model changed in connection with the UPS July 22 Reply Comments. *Id.* at 2. Instead, UPS characterizes the modifications in the Third Neels Model as technical changes in response to the comments addressing imputation of certain explanatory variables. *Id.* Moreover, UPS states that the need for Dr. Neels to impute the explanatory variables does not arise from any core features of his model, and is only necessary on a short-term basis because the Postal Service has not collected accurate parcel-related data in its Form 3999 database. *Id.* UPS states that Dr. Neels explained that the need to do any imputing could be eliminated altogether – potentially within one year – if the Postal Service were to collect the missing parcel data. *Id.*

UPS asserts that Dr. Neels acknowledges that reliably imputing the missing data poses complex econometric issues, adding that "[w]hen he saw the opportunity to make the imputations more reliable, he pursued it." *Id.* UPS states the fact that Dr. Neels was open to addressing criticisms regarding complex econometric modeling issues should be encouraged, as the goal in this proceeding is to get to the right result. *Id.* at 2-3. UPS states that all parties have an interest in its imputation results being as reliable as possible. *Id.* at 3.

Regarding the Postal Service's examples of potential complications, UPS asserts, among other things, that Dr. Neels provided the allegedly missing explanations. *Id.* With respect to the need for thorough investigation of the new set of equations, UPS contends that Dr. Neels used the same diagnostic tests that the Postal Service used, so the Postal Service is familiar with the tests and have advocated for their utility. *Id.* at 4. With respect to separately imputing deviation and in-receptacle parcels after having

combined them into a single equation, UPS says Dr. Neels did this "to hew as closely as possible to his prior imputation models, while improving the reliability of the results." *Id.* UPS asserts that this underscores that the changes are technical modifications, as opposed to the wholesale adoption of new imputation approaches. *Id.*

D. UPS Reply to Amazon Motion to Strike

UPS states that Dr. Neels acknowledges that his temporary need to impute variables (due to gaps in Postal Service data) raises complex econometric issues. UPS Response to Amazon Motion to Strike at 1. It asserts that "Dr. Neels' willingness to consider and address the criticisms of his colleagues in order to generate more accurate and reliable results is a constructive approach – not one that should be rejected out of hand." *Id.* at 1-2

UPS claims that Amazon does not argue against the merits of Dr. Neels' changes or claim that they do not improve the results, but instead "objects to the very idea that Dr. Neels would make any adjustments whatsoever." *Id.* UPS asserts that Amazon's claims that consideration of the Third Neels Model would violate the Due Process Clause and the notice requirements of the Administrative Procedure Act lack merit. *Id.*

UPS states that Dr. Neels' willingness to make technical adjustments to his model is fully consistent with the flexible and collaborative nature of this proceeding, as well as consistent with Amazon's stated goal, which UPS says it shares, of getting to the right outcome in this "important, complex, controversial and fact-intensive docket." *Id.* UPS also asserts that Amazon overstates the nature of the changes in the Third Neels Model. *Id.* at 2. It maintains that the "fundamentals" are unchanged, and characterizes the only changes as technical changes addressing how to impute certain explanatory variables to fill gaps in the Postal Service's data. *Id.* at 2, 3.

UPS discounts Amazon's reliance on a PRA-era Commission order to support striking the Third Neels Model. *Id.* at 3. UPS asserts that the order was issued in the context of more adversarial and less flexible Commission proceedings and that today's procedures for changes in analytical principles are highly flexible and more

collaborative. *Id.* at 3-4. UPS claims the Commission has followed these principles by promoting an active exchange of positions and criticisms among the parties and their experts, being “appropriately flexible” with the schedule, while avoiding prejudice to any party. *Id.* at 4. UPS claims that granting the Amazon Motion to Strike would dissuade experts from being responsive to constructive points made in similar proceedings. *Id.*

UPS asserts that Amazon's reliance on the PRA-era order is misplaced because in that case the Commission struck “additional studies” proffered on rebuttal, but declined to strike other portions of the witness's testimony that responded to criticisms by other parties. *Id.* at 5. UPS maintains that Dr. Neels’ refinements to his model in this docket constitute “true rebuttal,” and thus, were proper even under that order’s more adversarial approach. *Id.* at 6.

In response to Amazon’s assertion that UPS exceeded the scope of Commission Order Nos. 2455 and 2571 by submitting the Third Neels Model, UPS contends that the referenced orders did not prevent UPS from refining its model in reply comments. *Id.* at 2 n.1. Instead, it characterizes Order No. 2571 as granting UPS a brief extension to its reply comments in order to “promote development of a more complete record.” *Id.* UPS further states that courts fully anticipate that experts will continue to refine their work during the course of litigation. *Id.* at 5. It states this is especially true when the work is complex and technical, as it is here. *Id.* at 6. UPS contends it would be contrary to the public interest to prevent an expert from improving complex econometric models in light of criticisms raised by other experts. *Id.*

Moreover, UPS disputes Amazon's claim that its due process rights have been violated because Amazon was not given a chance to respond to the Third Neels Model. UPS contends that this argument fails because in this proceeding, the Commission has not done anything to deny Amazon the right to make substantive comments regarding the changes. *Id.* UPS states that Amazon simply chose to seek the “extraordinary relief” of a motion to strike, instead of seeking to respond on the merits. *Id.* It therefore contends that Amazon cannot complain about consideration of the Third Neels Model when Amazon was not denied the opportunity to respond to it. *Id.* at 7.

IV. COMMISSION ANALYSIS

A. Motions to Strike

Commission rule 3001.21(c) addresses motions to strike and provides in pertinent part: "[m]otions to strike are requests for extraordinary relief and are not substitutes for briefs or rebuttal evidence in a proceeding...." This regulation, coupled with UPS's correct observation that proceedings conducted pursuant to rule 3050.11 are intended to facilitate collaborative efforts through flexible procedures suited to the circumstances of each case, sets a high bar for motions to strike in proceedings of this type. However, having considered all points advanced by the Postal Service, Amazon, and UPS, the Commission concludes that the Third Neels Model and associated portions of the UPS July 22 Reply Comments exceed the authorized scope of reply comments, and thereby compromise both due process and the long-standing goal that this proceeding be completed in time for preparation of the FY 2015 ACR. In Order No. 2455, the Commission allowed UPS to develop the Second Neels Model, but cautioned that if unforeseen circumstances arose it could "take action to ensure that the objective of issuing a decision in time for preparation of the FY 2015 ACR is met." Order No. 2455 at 10. The Commission finds that the Third Neels Model constitutes such an unforeseen circumstance. Moreover, the Commission concludes that it cannot provide an adequate opportunity for all interested persons to respond to the Third Neels Model, consistent with due process, without unduly interfering with its ability to complete its deliberations in time for incorporation into the FY 2015 ACR.

B. Scope of Reply Comments

Order No. 2455 authorized UPS to address comments submitted on the Second Neels Model. Order No. 2571 addressed only procedural matters: it authorized access to non-public data to additional persons, and extended a comment deadline by one week. Contrary to UPS's contention, Order No. 2571 did not contemplate further development of the record in the form of a Third Neels Model. Instead, Order No. 2455

remained operative with respect to the scope of this proceeding, and contemplated that this proceeding would assess the validity of two proposed models — the Postal Service's model and the Second Neels Model — as alternatives to the status quo. Order No. 2455 clearly envisioned the comments and reply comments filed in response to the Second Neels Model would address solely that model, not a Third Neels Model. Thus, the Commission concludes that the Third Neels Model and associated parts of the UPS July 22 Reply Comments exceed the authorized scope of reply comments.

C. Due Process Concerns and Related Delay

UPS claims that Amazon had the opportunity to respond to the Third Neels Model on the merits, but instead elected to file a motion to strike. This contention does not square with the fact that the revised procedural schedule did not authorize additional comments. The procedural schedule instead contemplated that the Second Neels Model was the only alternative to the Postal Service's model under consideration in this proceeding. To allow the Third Neels Model to remain on the record, without allowing for additional comment by interested parties, would violate Amazon's and the Postal Service's due process rights. The Commission concludes that allowing for additional comment would hinder the proceeding's stated objective of completion in advance of the deadline for the FY 2015 ACR.

The likelihood of substantial delay if the Third Neels Model is permitted to remain in the record is evidenced by the descriptions in the Motions to Strike of the substantive differences between the Second Neels Model and Third Neels Model. These substantive changes — and others that may be discovered upon further review — would need to be thoroughly evaluated by the Commission, the Postal Service, Amazon and any other interested persons.

D. Summary

In many respects, the flexibility of rule 3050.11 has allowed the Commission to tailor this proceeding to accommodate various developments, including expanded

stakeholder participation and UPS's submission of two alternative models. Thus, the expectation that rule 3050.11 would foster collaboration and robust discussion has been demonstrated through this proceeding. At the same time, the Third Neels Model (and related discussion in the UPS July 22 Reply Comments) exceeds the reasonable scope of reply comments, and thereby impinges on due process. Significantly, the Commission finds that including the Third Neels Model and related discussion in the UPS July 22 Reply Comments would unduly interfere with the Commission's ability to conclude this case in a timely fashion. Accordingly, the Commission grants the Motions to Strike. Consideration of an alternative to the Postal Service's model is limited to the Second Neels Model.

It is ordered:

1. The Commission grants the Motion of the United States Postal Service to Strike Third Set of Models Submitted by United Parcel Service, filed July 27, 2015, and the Motion of Amazon Fulfillment Services, Inc., to Strike Portions of Reply Comments Filed by United Parcel Service, Inc. on July 22 and 23, 2015, filed July 29, 2015.
2. Consideration of an alternative to the Postal Service's model is limited to the Second Neels Model appearing as Exhibit A to United Parcel Service Comments Attaching Supplemental Report Related to Proposal Thirteen, filed June 8, 2015.

By the Commission.

Ruth Ann Abrams
Acting Secretary